STATE OF MICHIGAN

IN THE SUPREME COURT

* * * *

DANIEL KNUE and JACQUELINE KNUE,

Plaintiffs/Appellees,

vs.

CORNELIUS "CASEY" SMITH,
JOAN SMITH and STEVE SMITH,

Defendants/Appellants.
_____/

Supreme Court No. _____

Court of Appeals No. 255702

Ottawa County Circuit Court
Case No. 02-043890-CE

130377

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APPELLEES' BRIEF IN OPPOSITION

TO APPLICATION FOR LEAVE TO APPEAL

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I. COUNTER-STATEMENT IDENTIFYING THE JUDGMENT APPEALED FROM AND INDICATING RELIEF SOUGHT

Defendants-Appellants in the above captioned matter (hereinafter sometimes also referred to as the "Defendants") seek leave of this Court to appeal the Michigan Court of Appeal's December 13, 2005 published opinion (**Exhibit 1** herein) that affirmed the trial court's grant of Plaintiff-Appellees' (hereinafter sometimes also referred to as the "Plaintiffs") motion for actual costs and attorneys fees brought pursuant to MCR 2.405.

Plaintiffs prevailed at a trial upon the merits of the case as set forth in the trial court's determination within its Findings of Fact, Conclusions of Law and Order of the Court (**Exhibit 2** herein). Thereafter, Plaintiffs brought a timely motion for actual costs and attorneys fees pursuant to MCR 2.405 which the trial court granted, after a hearing and a review of the requested costs and attorneys fees for reasonableness, by its Order and Opinion (**Exhibit 3** herein). In said Order and Opinion, the trial court granted the relief sought by Plaintiffs, having found that Plaintiffs had prevailed in the underlying case, had made a proper offer of judgment to Defendants in accord with the offer of judgment rule, MCR 2.405, and further, that MCR 2.405 did apply to the underlying case notwithstanding its primarily equitable nature (Defendants had brought counter-claims of nuisance and intentional trespass, but these were apparently abandoned by Defendants' at trial by their failure to proffer any testimony or proof concerning same during the trial).

Thereafter, Defendants' filed a timely Motion for Reconsideration. The trial court considered Defendants' motion, but reaffirmed its underlying award of actual costs and attorneys fees to Plaintiffs by its Order and Opinion (**Exhibit 4** herein).

Defendants then timely appealed by right to the Michigan Court of Appeals. In its opinion affirming the trial court's two underlying decisions, the Court of Appeals reviewed the trial court's interpretation of MCR 2.405 de novo. After reviewing the briefs submitted by the parties' respective counsel and hearing the oral arguments in open court, the Court of Appeals held that the quiet title action of the underlying case, though equitable in nature, was distinguishable from the facts and position of the parties in Hessel v. Hessel, 168 Mich. App. 390; 424 N.W.2d 59 (1988) for the reason that in the Hessel case, "offer" was by a proposed martial property settlement containing items of property that by their very nature were resistant to valuation. The Court of Appeals opined that while in the case at bar the Plaintiffs had sought the transfer of the real property at issue in the case, Plaintiffs had also offered payment of $3,000.00 in exchange for the entry of judgment in Plaintiffs' favor. For the reason that Plaintiffs herein had offered payment of a "sum certain," that is, the payment of $3,000.00, in exchange for the real estate that was the crux of the underlying case, the Court of Appeals held in favor of Plaintiffs on the issues of whether MCR 2.405 applied in this equitable case, and whether the offer made by Plaintiffs was a proper offer under the rule.

Turning to Defendants' argument that the trial court should have invoked the "interest of justice" exception to MCR 2.405, the Court of Appeals reviewed the various instances where the exception is properly applied and determined that the exception did not fit with the facts or position of the underlying case. The Court of Appeals thus affirmed in whole the decisions of the trial court awarding actual costs and reasonable attorneys fees to Plaintiffs.

* * *

With respect to the relief sought by Plaintiffs, Plaintiffs request that this Court deny Defendants' application for leave to appeal in its entirety.

II. COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

A. Should this Court review or peremptorily reverse the Court of Appeals' opinion concluding that MCR 2.405 applies to an underlying action where that action involved both an equitable remedy sought by the Plaintiffs and an award of damages sought by Defendants in their counter-complaint?

Defendants-appellants answer, "yes."

Plaintiffs-appellees answer, "no."

The Court of Appeals would answer, "no."

The trial court would answer, "no."

B. Should this Court review or peremptorily reverse the Court of Appeals' opinion holding that plaintiffs' counsel's May 16, 2003 letter qualified as an "offer of judgment" under MCR 2.405(A)(1) where the letter clearly indicated Plaintiffs' intent to invoke the offer of judgment rule and therewith offered the sum of $3,000.00 in exchange for a judgment in favor of Plaintiffs – the title to the underlying real property at issue in Plaintiffs' claim?

Defendants-appellants answer, "yes."

Plaintiffs-appellees answer, "no."

The Court of Appeals would answer, "no."

The trial court would answer, "no."

C. Should this Court review or peremptorily reverse the Court of Appeals' opinion holding that the trial court did not abuse its discretion in refusing to apply the "interest of justice" exception to awarding plaintiffs attorney fees where the underlying law suit did not involve an unsettled area of law, public interest purpose in the underlying litigation, substantial damages were not at issue, and gamesmanship was not a factor?

Defendants-appellants answer, "yes."

Plaintiffs-appellees answer, "no."

The Court of Appeals would answer, "no."

The trial court would answer, "no."

III. COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Plaintiffs/Appellees Daniel and Jacqueline Knue (the "Plaintiffs") brought an action for adverse possession and acquiescence in the boundary line against Defendants/Appellants Cornelius "Casey" Smith, Joan Smith and Steve Smith (the "Defendants"). The Plaintiffs' quiet title action sought resolution of a dispute that had arisen concerning the location of the boundary line between their adjoining residential properties. Plaintiffs also sought and obtained a temporary restraining order to prevent Defendants from causing additional damage to Plaintiffs' real property.

A. Nature of the Action.

Plaintiffs generally agree with the statement given by Defendants, but dispute the inference that the underlying action was solely "equitable" in nature given the fact that Defendants had counter-complained against Plaintiffs on claims of "nuisance" and "intentional trespass," giving rise to potential treble damages against Plaintiffs if the trial court found in favor of Defendants on their counter-claims (**Exhibit 5** herein) as expressly set forth in Defendants' prayer for relief as follows:

> 1. Award Counter-Plaintiffs any and all damages including, but not limited to, actual damages to which they may be entitled, treble damages pursuant to MCL 600.2919, and other relief to which they are found entitled in equity and under law.
>
> 2. Grant preliminary and permanent injunctive relief in favor of Counter-Plaintiffs, preserving and protecting their lawful property interests and enjoining Counter-Defendants to cease and desist in the activities which have given rise to trespasses and nuisances on Counter-Plaintiffs' property.
>
> 3. Grant Counter-Plaintiffs any other legal or equitable relief to which they are found entitled under the circumstances, including costs, interests, and fees so wrongfully incurred.

B. Material Facts and Proceedings.

Plaintiffs generally agree with the statement set forth by Defendants, but further state that Plaintiffs' counsel's offer of judgment letter (**Exhibit** 6 herein) included a specific reference to MCR 2.405 in its 'regards' line, and the letter is more appropriate described as follows:

> Re: Knue v Smith, et al.
> Case No. 02-43890-CE
> Rule 2.405 Offer to Stipulate to Entry of Judgment
>
> Dear Mr. Karafa:
>
> Please accept and transmit this offer to your clients for Stipulation of entry of Judgment.
>
> My clients are willing to stipulate to the entry of Judgment in the following manner:
>
> 1. Your clients transfer by Quit Claim Deed the disputed property as described in the survey of Holland Engineering, being approximately 1,032 square feet in a generally triangular plot of land;
>
> 2. In return for the transfer of the property, my clients will pay in cash or cash equivalent the sum of $3,000.00 delivered to you and made payable as you direct;
>
> 3. All claims asserted by both sides dismissed with prejudice and without costs.
>
> Please transmit this offer to your clients, and accept or reject said offer within 21 days as required under MCR 2.405.

C. The Trial Court's Decision.

Plaintiffs generally agree with Defendants' statement of the trial court's decision. Plaintiffs would like to clarify, however, that the offer of judgment they made to Defendants was Plaintiffs' offer to *pay to Defendants* $3,000.00 in exchange for the real property Plaintiffs

claimed in their law suit, and that the result after trial was an award of $699.26 *against* Defendants *and* an award of title to the claimed real property also *against* Defendants.

D. The Court of Appeals' Decision.

Except for Defendants' counsel's editorial interpretation of the underlying bases and reasons for the decision, Plaintiffs generally agree with Defendants' recitation of the Court of Appeals decision and opinion. Plaintiffs disagree, however, with Defendants' counsel's interpretation of that portion of the Court of Appeals decision that rejected Defendants' "interest of justice" argument. Plaintiffs suggest, contrary to Defendants' interpretation, that the Court of Appeals decision to affirm the trial court's decision not to invoke the "interest of justice" exception was based, in part, on the fact that the underlying case itself did not involve an unique or unsettled issues of law. Defendants continue to argue that the "unsettled law" factor that should mitigate in favor of exercising the "interest of justice" exception should apply in the instant case because, they argue, the award of attorneys fees and costs in accordance with MCR 2.405 upon what Defendants continue to erroneously construe as a "solely equitable remedy" lawsuit is the "unsettled" issue of law. The Court of Appeals did not agree that the underlying case involved an issue of "unsettled" law, but argued in the alternative by stating, "[e]ven if the law were unsettled in this area, there were no substantial damages at issue here such that the "interest of justice" exception should apply." Knue v. Smith, __ Mich. App. __; __ N.W.2d __ (2005) (Slip op. at 3).

IV. COUNTER-STATEMENT OF STANDARD FOR GRANTING LEAVE TO APPEAL

Defendants state that this Court should grant their Application for Leave to Appeal for reasons based upon MCR 7.302(5) and to a lesser extent, MCR 7.302(3). Defendants base their argument upon their belief that the Court of Appeals' opinion is "clearly erroneous, conflicts with other published Court of Appeals opinions, and will cause material injustice, not only in this case but likely in future cases in which lower courts rely on the Court of Appeals' opinion." The primary concern seems to be, however, the effect the Court of Appeals decision will have upon "every quiet title action, as well as any number of other equity-based types of action in Michigan." This position presumes that this Court did not intend MCR 2.405 to apply to equity based actions in Michigan.

In fact, contrary to Defendants' point-of-view, and although this Court specifically excluded equity actions from MCR 2.403 by expressly adding language limiting the rule to "any civil action in which the relief sought is primarily money damages or division of property" (MCR 2.403(A)(1)), this Court chose not to similarly limit MCR 2.405. Defendants would ask this Court to peremptorily modify the stated court rule and impose the equity limitation contained within MCR 2.403 upon MCR 2.405. As the Court of Appeals stated, the rule's only requirement on this issue is clear: so long as there is a "sum certain" written offer of judgment, the rule does not limit its application to cases seeking only money damages.

For this reason, as explained by the Court of Appeals, their decision in this case is not contrary to prior decisions of the Court of Appeals (specifically: Hessel v. Hessel *and* Best Financial Corp. v. Lake States Ins. Co., 245 Mich.App. 383; 628 N.W.2d 76 (2001)), nor is the decision clearly erroneous. Furthermore, denying in its entirety Defendants' application for leave to appeal, thereby leaving the Court of Appeals' decision unchanged, will not work a

"material injustice" upon Defendants nor future parties: MCR 2.405 is clear in its construction – it is limited in its application to written offers for a "sum certain" – and these Defendants (or their counsel at the time) ignored that very limited restriction to their detriment. As the Court of Appeals has specifically held on more than one occasion: MCR 2.405 should be generally construed to grant attorney fees in order to further its purpose to encourage settlement and to deter protracted litigation.[1]

[1] *See generally:* Central Cartage Co. v. Fewless, 232 Mich.App. 517, 533; 591 N.W.2d 422, 430 (1998) (The purpose of MCR 2.405 is to encourage "parties to seriously engage in the settlement process and avoid prolonged litigation"); Miller v. Meijer, Inc., 219 Mich.App. 476, 480; 556 N.W.2d 890, 892 (1996) (the "grant of attorney's fees under MCR 2.405 should be the rule rather than the exception, [and] the fact that defendant may have proceeded to trial in good faith does not excuse its liability for fees when it knowingly rejected plaintiff's offer of judgment at the risk of having to pay those fees") (citations omitted).

V. COUNTER-STATEMENT OF STANDARD OF REVIEW IN SUBSTANTIVE APPEAL

Plaintiffs accept Defendants' Statement of the Standard of Review in Substantive Appeal.

ARGUMENT

I.

THIS COURT SHOULD NOT GRANT REVIEW OR PEREMPTORILY REVERSE THE COURT OF APPEALS' OPINION CONCLUDING THAT MCR 2.405 APPLIES TO AN UNDERLYING ACTION WHERE THAT ACTION INVOLVED BOTH AN EQUITABLE REMEDY SOUGHT BY THE PLAINTIFFS AND AN AWARD OF DAMAGES SOUGHT BY DEFENDANTS IN THEIR COUNTER-COMPLAINT.

A. Preservation of Issue

In their defense of the Motion for Costs, Defendants raised as an objection to the award of MCR 2.405 sanctions the issue of whether MCR 2.405 applies in a case founded upon an equitable clear title action. This issue was also appealed to the Michigan Court of Appeals. There the Court reviewed the question and held that the question of equity is irrelevant to the issue addressed by the rule: whether there was a written offer for a "sum certain." The Court of Appeals determined that in the instant case there existed a written offer for a "sum certain" and affirmed the trial court's decision.

B. Argument

The purpose of MCR 2.405 is to encourage "parties to seriously engage in the settlement process and avoid prolonged litigation." Central Cartage Co. v. Fewless, 232 Mich.App. 517, 533; 591 N.W.2d 422, 430 (1998). Furthermore, the "grant of attorney's fees under MCR 2.405 should be the rule rather than the exception, [and] the fact that defendant may have proceeded to trial in good faith does not excuse its liability for fees when it knowingly rejected plaintiff's offer of judgment at the risk of having to pay those fees." Miller v. Meijer, Inc., 219 Mich.App. 476, 480; 556 N.W.2d 890, 892 (1996) (citations omitted).

This Court is required to apply general principles of statutory construction when interpreting the meaning of a court rule. Hinkle v. Wayne Co. Clerk, 467 Mich. 337, 340; 654 N.W.2d 315 (2002). "When the language is unambiguous, [this Court] must enforce the meaning plainly expressed, and judicial construction is not permitted." Id. at 340. Moreover, "[t]he intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole. When interpreting a court rule or statute, we must be mindful of "the surrounding body of law into which the provision must be integrated...." Haliw v. City of Sterling Heights, 471 Mich. 700, 706; 691 N.W.2d 753, 756 (2005) *quoting* Green v. Bock Laundry Machine Co., 490 U.S. 504, 528; 109 S.Ct. 1981; 104 L.Ed.2d 557 (1989) (Scalia, J., concurring).

MCR 2.405 (**Exhibit 7** herein) sets forth the procedure by which a party may recover its "Actual Costs," including a reasonable attorney fee. The rule requires the offering party to make "written notification to an adverse party of the offeror's willingness to stipulate to the entry of a judgment in a sum certain, which is deemed to include all costs and interest then accrued." MCR 2.405(A)(1). Plaintiffs made such an offer to Defendants on May 16, 2003. (**See Exhibit 6.**) The rule does not specify the manner in which this offer is to be made other than that the offer is to be "in writing" and for a "sum certain." MCR 2.405(A)(1).

On its face, MCR 2.405 does not discriminate based upon whether the underlying case is one based in equity or in law. This fact has been acknowledged by the Court of Appeals in an unpublished opinion, Blessing v. Christensen, unpublished opinion per curiam of the Court of Appeals, decided May 21, 2002 (Docket No. 228451) (2002 WL 1040576 (Mich.App. 2002)) (copy attached) at *5 ("there is no distinction between equity and damages in MCR 2.405(D)"); *see also*, Sandstone Investment Co. v. City of Romulus, unpublished opinion per curiam of the

Court of Appeals, decided August 20, 1999 (Docket No. 205476) (1999 WL 33437837 (Mich.App. 1999)) (copy attached) at *5-*6 (awarding MCR 2.405 sanctions where both an equitable claim for specific performance in addition to a claim for money damages were at play in the underlying litigation); *and Cf.* Central Cartage Co., 232 Mich.App. at 530-534 (awarding MCR 2.405 sanctions arising out of litigation involving both an equitable cause of action and a demand for monetary relief).

One of the principle factors in reviewing an offer under MCR 2.405(A)(1) is that the offeror express in writing a "willingness to stipulate to the entry of a judgment in a sum certain." Several cases have addressed the issue of what constitutes a "sum certain." One of those cases is a 1998 ruling of the Court of Appeals in Hessel v. Hessel, 168 Mich.App. 390; 424 N.W.2d 59 (1998). The Hessel Court did not allow actual costs under MCR 2.405. However, that decision was based upon an underlying fact issue materially distinguishable from the instant case: the offer of judgment was a proposed list of marital assets for the division of marital real and personal property containing assets that fluctuated in value depending upon market forces, chance and when or whether certain accounts were liquidated rather than a specific "sum certain" dollar amount. Id. at 395.

Unlike the matter in Hessel, the instant case is a dispute between unrelated parties and the offer of judgment included an offer to stipulate to judgment in the specific dollar amount of $3,000.00, more akin to the facts in Sandstone, *supra* and Central Cartage Co., 232 Mich.App. 517, 532 (1998) (all that is required to make a MCR 2.405 offer "proper" is for the offeror to "express a willingness 'to stipulate to the entry of a judgment'" for a "specific amount"). Moreover, in the instant case, contrary to the facts of Hessel, the value of the real property at issue was irrelevant and never at issue in the case. Defendants seek to raise the issue of the value

of the real property for the first time **after trial** to fabricate a link between this case and the Hessel decision.

Even if the real property portion of Knue's offer were dropped from the instant offer (unlike Hessel, there was no "personal property" aspect to Plaintiffs' offer), the remaining portion, an offer to stipulate to a judgment against the Plaintiffs in the amount of $3,000.00 certainly meets the requirement. *See* Sandstone, 1999 WL 33437837, *6 (the Court of Appeals upheld an award of attorney's fees and costs based on MCR 2.405 where the defendant submitted an offer of judgment addressing plaintiff's equitable claim for specific performance as well as to plaintiff's claim for money damages because the offer clearly indicated defendant's willingness to stipulate to the entry of judgment of a sum certain in the amount of $20,000.00).

In Sandstone, as in the instant case, an offer to stipulate to judgment included a specific amount of money to which the offeror would agree to be bound by judgment and the offer would resolve both equitable and monetary damage claims. In the instant case, Plaintiffs brought an equitable action seeking an award of the real property in dispute. In response, Defendants filed and served a Counter-Claim for intentional trespass and nuisance requesting **actual and treble money damages**.

Furthermore, the Knues' offer to stipulate to the entry of judgment, although inarticulately stated by this attorney, clearly and multiple times indicated the intention to be bound by MCR 2.405 and expressed a willingness to stipulate to the entry a judgment in the specific "sum certain" amount of $3,000.00. The value of the real property in dispute was not an issue at trial, rather, Plaintiffs' case dealt with the location of the boundary line. Defendants' case, apparently abandoned at trial (although this alleged abandonment was never disclosed until

after trial at the hearing on Plaintiffs' motion for costs and attorney fees), concerned alleged claims of nuisance and intentional trespass and demanded money damages as relief.

Therefore, and for the foregoing reasons, the Court of Appeals' decision is not clearly erroneous and this Court should neither peremptorily reverse nor grant leave to appeal to consider the pretended issues Defendants raise in their application for review.

II.

THIS COURT SHOULD NOT REVIEW OR PEREMPTORILY REVERSE THE COURT OF APPEALS' OPINION HOLDING THAT PLAINTIFFS' COUNSEL'S MAY 16, 2003 LETTER QUALIFIED AS AN "OFFER OF JUDGMENT" UNDER MCR 2.405(A)(1) WHERE THE LETTER CLEARLY INDICATED PLAINTIFFS' INTENT TO INVOKE THE OFFER OF JUDGMENT RULE AND THEREWITH OFFERED THE SUM OF $3,000.00 IN EXCHANGE FOR A JUDGMENT IN FAVOR OF PLAINTIFFS – THE TITLE TO THE UNDERLYING REAL PROPERTY AT ISSUE IN PLAINTIFFS' CLAIM.

A. Preservation of Issue

Defendants raised their objection to the propriety of the May 16, 2003 Offer of Judgment letter allegedly during the hearing on Plaintiffs' MCR 2.405 motion for actual costs and attorney fees. This issue was also appealed to and heard by the Michigan Court of Appeals. There the Court reviewed the question and held that the instant offer of judgment did not contain any of the impermissible conditions that concerned the Court in Best Financial Corp. v. Lake States Ins. Co., 245 Mich.App. 383; 628 N.W.2d 76 (2001) and for the reason that the only "condition" referenced in Plaintiffs' offer of judgment was nothing more than what would have resulted by (and did result from) a decision on the merits at trial.

B. Argument

As earlier stated, the purpose of MCR 2.405 is to encourage "parties to seriously engage in the settlement process and avoid prolonged litigation." Central Cartage Co. v. Fewless, 232 Mich.App. 517, 533; 591 N.W.2d 422, 430 (1998). Furthermore, the "grant of attorney's fees under MCR 2.405 should be the rule rather than the exception, [and] the fact that defendant may have proceeded to trial in good faith does not excuse its liability for fees when it knowingly

rejected plaintiff's offer of judgment at the risk of having to pay those fees." Miller v. Meijer, Inc., 219 Mich.App. 476, 480; 556 N.W.2d 890, 892 (1996) (citations omitted).

"The plain language of MCR 2.405(A)(1) clearly requires an offer of judgment, not just an offer to settle." Haberkorn v. Chrysler Corp., 210 Mich.App. 354, 378; 533 N.W.2d 373, 385 (1995). In the Haberkorn case, the Court of Appeals explained that:

> An offer of judgment is not the same as an offer to settle. An agreement to settle does not necessarily result in a judgment. Although it usually results in a stipulated order of dismissal with prejudice, such an order does not constitute an adjudication on the merits. It merely "signifies the final ending of a suit, not a final judgment on the controversy, but an end of that proceeding."

Haberkorn, *supra*, *quoting* 9(A) Michigan Law & Practice, Dismissal & Nonsuit, Section 2, p. 137. Haberkorn provides some assistance in the determining the minimum requirements of an offer of judgment: it is not merely an offer of settlement. Contrasting an offer of judgment with an offer of settlement, the Haberkorn Court provided the following measurable factors: (1) whether a judgment is intended; (2) whether an adjudication on the merits will result; and (3) whether the offeror intends a final judgment on the controversy.

In the Haberkorn case, the defendant asserted that its letter offering to "settle" constituted an offer for purposes of MCR 2.405(A)(1). The Court held that it did not and specifically quoted the language of the letter wherein it referred to the offered deal as: a "new settlement offer"; "settlement"; and "this offer of settlement." Id. at 378-379. The Haberkorn Court held that, "while defendant expressed a willingness to settle and to bring an end to the case, it plainly did not express a willingness "to stipulate to the entry of a judgment in a sum certain."" Id. at 379 *quoting* MCR 2.405(A)(1).

Comparing this counsel's letter of May 16, 2003 **(see Exhibit 6)** to the factors expounded in Haberkorn, the letter no less than three (3) times refers to the offer in the following manner:

"Re: ... Rule 2.405 Offer to Stipulate to Entry of Judgment" (located in the reference block); "Stipulation of entry of Judgment" (located in the opening sentence); and "stipulate to the entry of Judgment" (located in the first sentence of the terms paragraph). The letter closes, "[p]lease transmit this offer to your clients, and accept or reject said offer within 21 days as required under MCR 2.405" (emphasis added).

Appling the Haberkorn factors, the letter meets the minimum requirements of a "proper" offer. First, the letter clearly intends a judgment: every reference to the offer refers to it as a "stipulation" for the "entry of judgment". Second, the letter intends an adjudication on the merits: although not clearly stated as such, judgment would enter against the Smiths on the clear title claim thereby transferring the disputed property to the Knues; judgment would enter against the Knues on the counter-claims for a total specified amount of $3,000.00; and as a "catch-all", any claims that were not otherwise resolved by the judgments would be dismissed with prejudice and without costs. Finally, the clear intention is that the offer would result in a final judgment resolving the entire controversy.

Defendants counsel relies heavily upon Best Financial in support of its argument that the May 16, 2003 offer to stipulate to the entry of judgment did not comply with the requirements of MCR 2.405. Best Financial, however, is clearly distinguishable because the letter in Best Financial was found to be nothing more than a ***continuation of settlement discussions that took place during a prior settlement conference***. There the Court of Appeals, in dismissing the letter as the mere continuation of settlement discussions, stated, "the language of the letter references the discussion that took place at the settlement conference with regard to the conditions defendant sought to impose in addition to payment of the proposed settlement amount; in essence, it continued the settlement discussion." Id. at 387 (emphasis added). In the instant matter, no

settlement conference had taken place. The May 16, 2003 letter was not a "continuation" of settlement discussions, but rather a line in the sand drawn with the intention that either the Defendants would accept the entry of judgment or suffer potential sanctions in the event that the Plaintiffs prevailed in the litigation. Of course, pursuant to the provisions of MCR 2.405, the risks associated with the potential sanctions could have impacted Plaintiffs negatively had there been a different result: had the Defendants counter-offered and thereafter prevailed at trial. Had that been the case, this case likely would not be before this Court.

In Best Financial, the Court of Appeals further stated that:

> from defendant's perspective, defense counsel's letter at best indicates a willingness to stipulate the entry of a judgment with particular conditions attached and therefore fails to comply with the requirements of MCR 2.405. Because of the insistence on conditions, the offer, if any, was not for a "sum certain" as required under MCR 2.405(A)(1).

Id. at 387. In the instant matter, the May 16, 2003 letter sets forth on multiple occasions that it was an offer under MCR 2.405 to stipulate to entry of **judgment** and that the unconditional terms of the judgment were as follows:

> (1) That a judgment would enter against the Defendants granting Plaintiffs by quit claim deed the disputed property (as that term had been defined by Plaintiff with a specific surveyed legal description);
>
> (2) That a judgment would enter against Plaintiffs in the specific amount of $3,000.00; and
>
> (3) Any remaining claims not resolved by the judgments so entered would be dismissed with prejudice and without costs.

As expressed, there were no contingencies. Moreover Defendants' attorney did not object to the letter based on any alleged contingencies or upon any other basis, but rather objected to the offer to "stipulate to entry of judgment" on the sole basis that the offer under MCR 2.405 was not available in "equity" cases. Although inarticulately set forth, Plaintiffs' counsel's May 16,

2003 letter clearly indicated that the offer was for a "stipulation for entry of judgment" and that judgment would enter against Plaintiffs in the specific amount of $3,000.00 on their counter-claims of intentional trespass and nuisance. In its order denying Defendants' Motion for Reconsideration, the trial court found specifically that the May 16, 2003 Offer of Judgment, "was one in the form necessary to resolve such a claim and did not involve the attachment of conditions." **(See Exhibit 4, p. 3)** (emphasis added).

Defendants did not counteroffer and the matter proceeded to trial. At trial, Plaintiffs obtained a judgment against Defendants for all of the disputed property set forth in their MCR 2.405 offer, and further, obtained a judgment of costs against Defendants in the amount of $699.26. **(See Exhibit 2, p. 7; Exhibit 3, pp. 2-3).** The trial court, in reviewing the issues before it on the motion brought by Plaintiffs for actual costs under MCR 2.405, considered the language of the May 16, 2003 letter and found in favor of Plaintiffs. **(See Exhibit 3, p. 6; Exhibit 4, p. 3).** The trial court also considered the issue of whether the verdict was more favorable to Plaintiffs than to Defendants and also resolved this issue in favor of Plaintiffs. **(See Exhibit 3, p. 6).0**

In its decision in this case, the Court of Appeals explained that the conditions that defeated the offer in Best Financial was the condition that the parties enter into a separate, and presumably negotiated, confidentiality agreement and a termination of the relationship between the plaintiff and the defendant. These conditions would have required further "settlement" negotiations concerning the manner, language, terms of the confidentiality agreement, if not also a similar post judgment negotiation of the termination of the parties relationship. In Best Financial, the parties were an insurance agency and an insurance company. The insurance agency had written contracts with customers and Lake States Insurance Company, the Defendant. Ostensibly, the Plaintiff continued to receive residual income from insurance contract renewals

and monthly premium payments. Therefore, the termination of the parties' relationship in Best Financial would likely have required substantial discussions and agreements concerning the continued payment of residuals or a lump sum settlement payment of same. The Court of Appeals explained that the Best Financial additional conditions went beyond mere dismissal of the case or the transfer of specifically defined real property by recorded quit claim deed – a meaningless term given that upon Plaintiffs' prevailing at trial, the transfer would have to be recorded anyway. Moreover, MCR 2.405(B) permits an offer of judgment on the whole or only part of the claims in the case. In the instant matter the offer sought to stipulate to the entry of judgment on the whole case.

Therefore, and for the foregoing reasons, the Court of Appeals' decision that Plaitniffs' offer of judgment "contained no separate conditions" is not clearly erroneous and this Court should neither peremptorily reverse nor grant leave to appeal to consider the pretended issues Defendants raise in their application for review.

III.

THIS COURT SHOULD NEITHER REVIEW NOR PEREMPTORILY REVERSE THE COURT OF APPEALS' OPINION HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO APPLY THE "INTEREST OF JUSTICE" EXCEPTION TO AWARDING PLAINTIFFS ATTORNEY FEES WHERE THE UNDERLYING LAW SUIT DID NOT INVOLVE AN UNSETTLED AREA OF LAW, PUBLIC INTEREST PURPOSE IN THE UNDERLYING LITIGATION, SUBSTANTIAL DAMAGES WERE NOT AT ISSUE, AND GAMESMANSHIP WAS NOT A FACTOR.

A. Preservation of Issue

Defendants properly preserved this issue in the trial court. The Court of Appeals reviewed Defendants' arguments on appeal and affirmed the trial court's decision regarding same. The Court of Appeals disagreed with Defendants' contention that the "interest of justice" exception should be invoked in a case of first impression on appeal because the underlying litigation and conduct of the parties did not meet any of the indicia favoring exercise of the exception.

B. Standard of Review

An appellate court "reviews a trial court's decision to award sanctions under MCR 2.405 for an abuse of discretion." J.C. Bldg. Corp. II v. Parkhurst Homes, Inc., 217 Mich.App. 421, 426; 552 N.W.2d 466, 469 (1996). Similarly, this Court will reverse the amount awarded for attorney fees and for costs under MCR 2.405 only for an abuse of discretion. Id. at 428. "An abuse of discretion involves far more than a difference in judicial opinion." Williams v. Hofley Mfg. Co., 430 Mich. 603, 619; 424 N.W.2d 278, 286 (1988) *citing* Spalding v. Spalding, 355 Mich. 382, 384; 94 N.W.2d 810 (1959). A trial court abuses its exercise of discretion "only if its decision is grossly contrary to fact and logic, or evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." Haliw v. City of Sterling Heights, 257 Mich.App.

689, 694; 669 N.W.2d 563, 567 (2003) *reversed on other grounds* 471 Mich. 700; 691 N.W.2d 753 (Mich. 2005) *citing* Michigan Basic Prop. Ins. Ass'n v. Hackert Furniture Distributing Co., Inc., 194 Mich.App. 230, 234, 486 N.W.2d 68 (1992) *and* Elia v. Hazen, 242 Mich.App. 374, 377, 619 N.W.2d 1 (2000).

C. Argument

As set forth in Miller, *supra*, a trial court is required to hold an evidentiary hearing where, such as in the instant case, a challenge to the reasonableness of the attorney's fees requested under MCR 2.405 has been made. The Miller Court explained the requirement as follows:

> Where, as in this case, the party opposing the taxation of costs challenges the reasonableness of the fee requested, the trial court should inquire into the services actually rendered before approving the bill of costs. "Although a full-blown trial is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is." "[T]he trial court need not detail its findings as to each specific factor considered" in its determination of reasonableness. However, the court is required to make findings of fact with regard to the attorney fee issue.

Id. at 479-480 (citations omitted) *quoting* Wilson v. General Motors Corp., 183 Mich.App.21, 42-43; 454 N.W.2d 405 (1990) *and* Wood v. DAIIE, 413 Mich. 573, 588; 321 N.W.2d 653 (1982) *respectively, and citing* Howard v. Canteen Corp., 192 Mich.App. 427, 439; 481 N.W.2d 718 (1992).

"The grant of attorney's fees under MCR 2.405 should be the rule rather than the exception [and] the fact that Defendant may have proceeded to trial in good faith does not excuse its liability for fees when it knowingly rejected plaintiff's offer of judgment at the risk of having to pay those fees." Miller, *supra*, at 480 (citations omitted).

"The purpose of the Offer of Judgment rule is to encourage settlement and to deter protracted litigation." Reitmeyer v. Schultz Equip. & Parts Co., Inc., 237 Mich.App. 332, 338;

602 N.W.2d 596, 600 (1999). In the Reitmeyer case, this Court discussed its rule in Luidens v. 63rd District Court, 219 Mich.App. 24, 31; 55 N.W.2d 709 (1996) and explained that in Luidens:

> This Court interpreted the "interest of justice" exception of MCR 2.405(D)(3), which states that "[t]he court may, in the interest of justice, refuse to award an attorney fee under this rule." This provision of the offer of judgment rule was an exception to the general rule that actual costs must be paid if the parties met certain prerequisites, MCR 2.405(D)(1) and (2). After considering the context of the language in the exception, and the purpose of MCR 2.405 – to encourage settlement and to deter protracted litigation – this court commented on the "exceptional nature" of the provision, and determined that the "interest of justice" would be implicated only in "unusual circumstances." Absent these "unusual circumstances," the general rule would apply. This court was particularly concerned with limiting the exception because of its susceptibility to broad interpretations that could potentially consume the general rule and thus nullify MCR 2.405's purpose of encouraging settlement.

Reitmeyer, *supra*, at 338-39.

This Court in Luidens, *supra*, at 31-36, set forth several non-exclusive factors regarding when, in "unusual circumstances" a trial court may invoke the "interest of justice" exception found within MCR 2.405(D)(3). First, this Court held, quoting Butzer v. Camelot Hall Convalescent Centre, Inc. (*after remand*), 201 Mich.App. 275, 278-279; 505 N.W.2d 862 (1993), that "the better position is that a grant of fees under MCR 2.405 should be the rule rather than the exception. To conclude otherwise would be to expand the "interest of justice" to the point where it would render the rule ineffective." This Court then articulated, quoting Hamilton v. Becker Orthopedic Appliance Co., 214 Mich.App. 593, 597; 543 N.W.2d 60(1995):

> [I]n the absence of any articulated and compelling rationale, we believe that the interest of justice is served by awarding attorney's fees and costs to vindicate the purpose of the rule, thereby increasing the prospect that parties seriously will engage in the type of settlement process the rule clearly contemplates.

The Court of Appeals continued with the following:

> We believe that the exceptional nature of the "interest of justice" provision, the settlement-encouraging purpose of MCR 2.405 and these precedents of the Court set the broad parameters of the exception. Attempts to give meaning to the term

> "interest of justice" must fit within these parameters. We are mindful that this term is susceptible to broad readings that would consume the general rule of awarding fees and nullify MCR 2.405's purpose of encouraging settlement. The term "is not the equivalent of a legal Rorschach test on to which each jurist may project his or her individualized notion of justice."

Luidens, *supra*, at 32-33 (citations omitted).

The guidelines set forth by this Court in Luidens for exercising the "interest of justice" exception found at MCR 2.405(D)(3) included the following non-exhaustive list:

> (1) A "reasonable refusal of an offer, alone, is insufficient to justify not awarding attorney's fees under MCR 2.405;
>
> (2) The "[p]arties' economic standing should not determine whether they face the risk of costs and attorney's fees in rejecting an offer of judgment";
>
> (3) The exception requires "something more than merely that the losing party's position was "not frivolous"";
>
> (4) The exception should be exercised where it would remedy offers of judgment made for gamesmanship purposes "rather than as a sincere effort at negotiation";
>
> (5) The exception should be invoked where the underlying litigation "involve[d] a legal issue of first impression";
>
> (6) The exception should be exercised in a case "involving an issue of public interest that should be litigated";
>
> (7) The exception should be invoked "where the law is unsettled and substantial damages are at issue";
>
> (8) The exception should be exercised "where a party is indigent and an issue merits decision by a trier of fact"';
>
> (9) The exception should be brought to bear "where the effect on third persons may be significant."

Luidens, *supra*, at 33-36 (citations omitted).

This Court explained in Luidens that the "common thread" running throughout these examples is that "there is a public interest in having an issue judicially decided rather than

merely settled by the parties. In such cases, this public interest may override MCR 2.405's purpose of encouraging settlement." Id. at 36. In other words, it is the issue at conflict in the underlying litigation that gives rise to the public interest, not the issue brought up on appeal.

In the instant matter, the trial court analyzed at the motion hearing those issues brought before it including Defendants' objection to the reasonableness of the attorney fees requested and specifically found that the fees requested were reasonable. **(See Exhibit 3, p. 8.)** Furthermore, the Court considered Defendants' the arguments for the exercise and invocation of the "interest of justice" exception and specifically found that this was not a case involving "unusual circumstances" as outlined and explained by the Luidens decision and its progeny. **(See Exhibit 3, pp. 8-9.)**

Defendants, moreover, seek to invoke the exception by arguing that because the matter before this Court on Defendants' application is an issue of first impression, an exercise of the exception is warranted. For their authority, Defendants rely upon dicta contained within the Luidens decision. However, the only "issue of first impression" involved in the case is the one created by Defendants in their appeal. The underlying "case" did not involve any novel issues. To expand the Court of Appeals language in Luidens to include issues of first impression raised upon appeal would be to open the door to consume the rule within the exception: any case thereafter containing both an appeal of an award of attorneys fees under MCR 2.405 and a separate issue of first impression brought before the appellate court would mitigate for the defeat of the attorney fee award. Counsel would become very imaginative in creating issues of first impression solely for the purpose of defeating the attorney fee award.

Defendants also address the issue of facing the specter of "substantial damages" by the payment of attorney fees expended in the underlying case. Defendants suggest that the attorney

fees were incurred litigating the alleged unsettled issue of law. That is in fact plainly wrong and approaches a misrepresentation to this Court. The fees Plaintiffs incurred and were awarded dealt directly with the underlying trial of the quiet title, nuisance and intentional trespass actions involved therein. Not one penny of attorney fees was awarded for Plaintiffs' MCR 2.405 Motion nor any proceeding thereafter.

This court should let the decision of the Court of Appeal remain untouched concerning the issue of whether to invoke the "interest of justice" exception. The Court of Appeals' decision reviewed the law, applied same to the facts of this case and determined that the trial court had not abused its discretion in refusing to exercise the "interest of justice" exception found within MCR 2.405(D)(3).

CONCLUSION

The language of MCR 2.405 does not distinguish between cases at law and those in equity. The threshold requirement is that there be a written offer to stipulate to the entry of judgment for a "sum certain." Furthermore the Court, in Sandstone as well as in the analogous case in Central Cartage Co., did not express any difficulty in awarding actual costs under MCR 2.405 where the cases involved claims in equity or mixed actions of equity and legal damages. In Blessing, although the Court did not award actual costs to the defendant therein based upon its offer of judgment, the Court of Appeals found fault, not with the equitable nature of the case, but rather with the defendant's position that it was the prevailing party. The Blessing Court included in its "prevailing party" consideration the assessed value of the real property obtained by plaintiff and determined that plaintiff was in fact the "prevailing party" under MCR 2.405. Plaintiffs are in the same or similar position as these other parties. The Court clearly held that, "there is no distinction between equity and damages in MCR 2.405(D)". Id. at *5.

In the instant case, Plaintiffs brought an equitable claim for clear title on the basis of adverse possession and acquiescence in the boundary line. Defendants counter-claimed for actual and treble damages based upon intentional trespass and nuisance. Plaintiffs offered to stipulate to the entry of judgment against Defendants granting Plaintiffs the previously defined and legally described disputed property and for a judgment against Plaintiffs in favor of Defendants in the specific amount of $3,000.00. The letter of Plaintiffs' counsel dated May 16, 2003, clearly, on multiple occasions, communicated that it was intended to be an offer to stipulate to judgment under MCR 2.405 and never referred to its terms as those of a "settlement" offer nor the continuation of settlement discussions. Nor did it expressly make conditional or contingent any of its terms.

Therefore, in accordance with the Court of Appeals' direction in Haberkorn, Plaintiffs' offer to stipulate to the entry of judgment under MCR 2.405 as composed by Plaintiffs' counsel is proper. Furthermore, the trial and appellate courts analyzed Defendants' objections and came to this same conclusion after a review of the applicable authorities. The trial court's exercise of discretion was justified, and was not so palpably and grossly violative of fact and logic that it evidenced a perversity of will, a defiance of judgment or the exercise of passion or bias.

The trial and appellate courts fully reviewed the reasonableness of the fees requested and Defendants' arguments to invoke the "interest of justice" exception. The trial court determined that the fees were reasonable and both the trial and appellate courts found that there were no "unusual circumstances" in the underlying case justifying the exercise of the "interest of justice" exception.

RELIEF REQUESTED

Plaintiffs respectfully request that this Court deny Defendants' Application for Leave to Review.

Respectfully submitted,

PAUL A. LEDFORD, PLC

Dated: February 12, 2006

By: _____
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